

Update: Criminal Procedure Monograph 8—Felony Sentencing

Part II—Scoring the Statutory Sentencing Guidelines

8.5 Scoring an Offender’s Prior Record Variables (PRVs)

G. PRV 5—Prior Misdemeanor Convictions or Prior Misdemeanor Juvenile Adjudications

Insert the following text after the two bullets near the top of page 29:

A discharge and dismissal following a defendant’s successful completion of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James*, ___ Mich App ___, ___ (2005). MCL 333.7411(1) specifically states that “[d]ischarge and dismissal under [7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime”

8.6 Scoring an Offender's Offense Variables (OVs)

E. OV 4—Psychological Injury to a Victim

2. Case Law Under the Statutory Guidelines

Insert the following text at the bottom of page 48:

The Court of Appeals affirmed the trial court's scoring of ten points for OV 4 based primarily on the Court's conclusion that videotaped evidence showed the victims behaving in a manner that indicated both victims had suffered serious psychological injury as a result of the defendant's conduct. *People v Wilkens*, ___ Mich App ___, ___ (2005).

Said the *Wilkens* Court:

“With regard to the male victim, the videotape reveals that his attitude took a disturbing turn during the course of the forty-one minute incident. Toward the end, he resorted to making violent threats against the female victim to coerce her into continuing the sex acts. This, in light of the fact that the male victim's demeanor on the stand was rather casual, indicates that the male victim suffered serious psychological injury as a result of this incident such that he was rendered unable to comprehend the gravity of his actions. This supports the trial court's scoring of OV 4.

“With regard to the female victim, the trial court relied on statements that she made ‘on the videotape and everything else.’ Though the female victim did not testify, the videotape shows that the female victim repeatedly indicated that she did not want to continue the sex acts and that the ‘motion lotion’ was hurting her. Yet defendant asserted that the videotape was not worth the money he spent on the clothes and urged the female victim to continue. Ultimately, the female victim sat up in bed and remained silent while defendant attempted to coax her into continuing. This evidence indicates that defendant's actions caused the female victim anxiety, altered her demeanor, and caused her to withdraw; it supports a finding of serious psychological injury occurring to the female victim.” *Wilkens, supra* at ___.

8.6 Scoring an Offender's Offense Variables (OVs)

H. OV 7—Aggravated Physical Abuse

2. Case Law Under the Statutory Guidelines

Insert the following text before the first paragraph on page 53:

The assessment of points under OV 7 does not depend on whether the victim is alive or conscious of the treatment scored by this variable. *People v Kegler*, ___ Mich App ___, ___ (2005). Points are properly scored under OV 7 when a victim is treated with excessive brutality no matter how (or if) the victim subjectively experiences that treatment. Although OV 7 does account for a victim's treatment when the victim is conscious, its application is not limited to those criminal episodes where a victim's consciousness is implicitly required (when points are assessed for conduct intended to increase a victim's fear and anxiety). *Kegler, supra* at ___.

Insert the following text at the bottom of page 53:

Fifty points were appropriate where "the record indicates that defendant repeatedly stomped on the victim's face and chest after the victim was lying unconscious on the ground. Additionally, the victim was deprived of oxygen for a period of four to six minutes . . . and currently remains comatose with little or no chance of ever regaining consciousness." *People v James*, ___ Mich App ___, ___ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

I. OV 8—Victim Asportation or Captivity

2. Case Law Under the Statutory Guidelines

Add the following text after the third paragraph on page 56:

See also *People v Cox*, ___ Mich App ___, ___ (2005), where OV 8 was properly scored because even though the victim had been to the defendant's house on other occasions, the defendant was the individual who transported the victim to the defendant's house at the time the sexual offenses occurred.

8.6 Scoring an Offender's Offense Variables (OVs)

J. OV 9—Number of Victims

2. Case Law Under the Statutory Guidelines

Insert the following text after the second paragraph on page 58:

Ten points were appropriate under OV 9 where videotaped evidence showed a female victim and a male victim actually being harmed, or being placed in danger of injury, as a result of the defendant's conduct. *People v Wilkens*, ____ Mich App ____, ____ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

K. OV 10—Exploitation of a Vulnerable Victim

2. Case Law Under the Statutory Guidelines

Vulnerability—age of the victim.

Insert the following text after the partial paragraph at the top of page 62:

Points were appropriate under OV 10 where the “defendant ‘exploited’ the victim’s youth by manipulating her with clothes and alcohol in exchange for [her participation in] making the sexually abusive videotape.” *People v Wilkens*, ___ Mich App ___, ___ (2005).

Predatory conduct.

Add the following text after the second full paragraph on page 63:

See also *People v Cox*, ___ Mich App ___, ___ (2005), where points were properly scored for predatory or preoffense conduct when the defendant engaged in sexual conduct with “a seventeen-year-old mentally incapable victim.” In addition to the questions concerning the victim’s mental status, evidence established that the defendant visited the victim at his foster home, the victim had been to the defendant’s home on several occasions and had viewed pornographic material there, and the “defendant admitted to harboring the victim as a runaway from a foster home.”

8.6 Scoring an Offender's Offense Variables (OVs)

L. OV 11—Criminal Sexual Penetration

2. Case Law Under the Statutory Guidelines

Insert the following text on page 66 before the paragraph beginning with “3. Relevant Case Law...”:

OV 11 was properly scored at 25 points in Count 1 “because defendant was charged with only one penetration, yet he penetrated the female victim more than once during the making of the videotape” (evidence showed that the defendant penetrated the victim with his mouth and with a sex toy). *People v Wilkens*, ___ Mich App ___, ___ (2005). OV 11 was also properly scored at 25 points in Count 2 where the evidence established that, in addition to at least one other penetration, the defendant aided and abetted the male victim's penetration of the female victim.

See also *People v Cox*, ___ Mich App ___, ___ (2005), where the Court of Appeals affirmed an OV 11 score of 25 points for one penetration even when the defendant was convicted of two counts of CSC-1 for the two penetrations arising from the sentencing offense. According to the Court, “the proper interpretation of OV 11 requires the trial court to exclude the one penetration forming the basis of the offense when the sentencing offense itself is first-degree or third-degree CSC.”

8.6 Scoring an Offender's Offense Variables (OVs)

N. OV 13—Continuing Pattern of Criminal Behavior

2. Case Law Under the Statutory Guidelines

Insert the following text after the first paragraph on page 70:

OV 13 was properly scored at 25 points where the defendant was convicted of two felony offenses against a person and had two first-degree CSC charges pending at the time he was sentenced. *People v Wilkens*, ___ Mich App ___, ___ (2005).

8.6 Scoring an Offender's Offense Variables (OVs)

P. OV 15—Aggravated Controlled Substance Offenses

2. Case Law Under the Statutory Guidelines

Insert the following text before the first paragraph on page 74:

Dicta appearing in a case remanded for articulation of a substantial and compelling reason for departure indicates that, for purposes of scoring the guidelines, a person may “deliver” a controlled substance by injecting the substance into another person. *People v Havens*, ___ Mich App ___, ___ (2005). According to the Court:

“We assume that if injection constitutes delivery for purposes of conviction,* the same act constitutes delivery for purposes of scoring Offense Variable 15, MCL 777.45, aggravated controlled substance offenses, at twenty-five points for delivery of a controlled substance other than marijuana to a minor.” *Havens, supra* at ___.

*The *Havens* Court cited *People v Schultz*, 246 Mich App 695, 701–709 (2001), as support for the conclusion that a person can deliver a controlled substance for purposes of conviction by injecting it into another person.

Part IV—Habitual Offender Provisions

8.16 Sentencing an Offender for a Subsequent “Major Controlled Substance Offense”

C. Discretionary Sentence Enhancement—MCL 333.7413(2)

Insert the following text on page 107 immediately before the quotation of MCL 333.7413(5):

The discretionary authority in MCL 333.7413(2) to sentence a repeat offender to not more than twice the term of imprisonment otherwise authorized includes an increase in both the minimum and maximum terms in the range recommended by the statutory sentencing guidelines. *People v Williams*, ___ Mich App ___, ___ (2005). In *Williams*, the trial court properly concluded that MCL 333.7413(2) authorized it to double both values in the range recommended under the guidelines—in that case, from the range of 5 to 23 months “otherwise authorized” for conviction, to a range of 10 to 46 months. The Court of Appeals agreed:

“[T]he clear and unambiguous language of §7413(2) does not differentiate or suggest a distinction, either explicitly or implicitly, between maximum and minimum sentences; therefore, the word ‘term’ can entail and contemplate both maximum and minimum sentences.” *Williams, supra* at ___.

Part VI—Fashioning an Appropriate Sentence

8.31 Sentence Credit

Sheriff's good-time credits.

Insert the following text after the quoted paragraph on page 150:

Good-time credit earned during a sentence that is later declared invalid does not transfer to the sentence imposed after the first sentence was declared invalid. *People v Tyrpin*, ___ Mich App ___, ___ (2005). When a defendant is resentenced after a previous sentence is voided, the defendant is entitled only to credit for the number of days he actually spent incarcerated pursuant to the invalid sentence. Credits earned during the time served on the invalid sentence may not be applied to the defendant's sentence on remand. *Tyrpin*, *supra* at ___.

Part VIII—Specific Types of Sentences

8.42 Deferred Adjudication of Guilt

H. Discharge and Dismissal Without Entry of an Adjudication of Guilt

§7411.

Insert the following text before the first paragraph on page 186:

A discharge and dismissal following a defendant's successful fulfillment of probation under the deferred adjudication provisions of MCL 333.7411 is not a prior misdemeanor conviction for purposes of scoring PRV 5. *People v James*, ___ Mich App ___, ___ (2005). MCL 333.7411(1) specifically states that “[d]ischarge and dismissal under [7411] shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime”

Part IX—Sentence Departures

8.48 Requirements of a Sentence Departure

A. Substantial and Compelling Reason

Insert the following text after the third paragraph on page 198:

A trial court's characterization of the defendant's offenses as "egregious" is not an objective and verifiable determination that may be used as a substantial and compelling reason to depart from the statutory guidelines. *People v Havens*, ___ Mich App ___, ___ (2005).

Part IX—Sentence Departures

8.51 Exceptions: When a Departure Is Not a Departure

Insert the following text immediately before Part X at the top of page 209:

Enhancement under the repeat offender provision of MCL 333.7413(2).

When MCL 333.7413(2) permits a court to impose a sentence of not more than twice the term otherwise authorized, the enhancement authority extends to both the minimum and maximum terms. *People v Williams*, ___ Mich App ___, ___ (2005). For example, if the recommended minimum range under the guidelines is 5 to 23 months, §7413(2) permits an increase in both the upper and lower limit of the recommended range so that the allowable range would be 10 to 46 months. When, subject to the ranges discussed above, a court imposes a minimum sentence of 38 months, the sentence falls within the enhanced range authorized by §7413(2). Therefore, even though a term of 38 months exceeds the original range of 5 to 23 months, the sentence does not represent a departure for which a trial court must articulate a substantial and compelling reason.

When probation is an authorized alternative to imprisonment. Where the defendant was convicted of indecent exposure as a sexually delinquent person, the court has discretion in determining whether to sentence the defendant to jail, prison, or probation. *People v Buehler (On Remand)*, ___ Mich App ___, ___ (2005). Because probation is a valid alternative to incarceration under those circumstances, a sentence of probation is not a departure from the term of imprisonment recommended under the statutory sentencing guidelines. *Buehler, supra* at ___.

Part X—Selected Post-Sentencing Issues

8.52 Appellate Review of Felony Sentences

Insert the following text immediately before subsection (A) on page 210:

As set forth above, effective January 1, 2006, the deadline for filing a motion to correct an invalid sentence under MCR 6.429(B) is six months after entry of the judgment of conviction and sentence. In Administrative Order No. 2005-2, ___ Mich ___ (2005), the Court clarified that the rule is inapplicable to cases in which an order appointing appellate counsel entered before or on December 31, 2005. In cases in which an order appointing appellate counsel entered before or on December 31, 2005, a defendant must file a motion to correct an invalid sentence within 12 months of the date of the order appointing appellate counsel.